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No. 85-1762

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARYLAND CUP CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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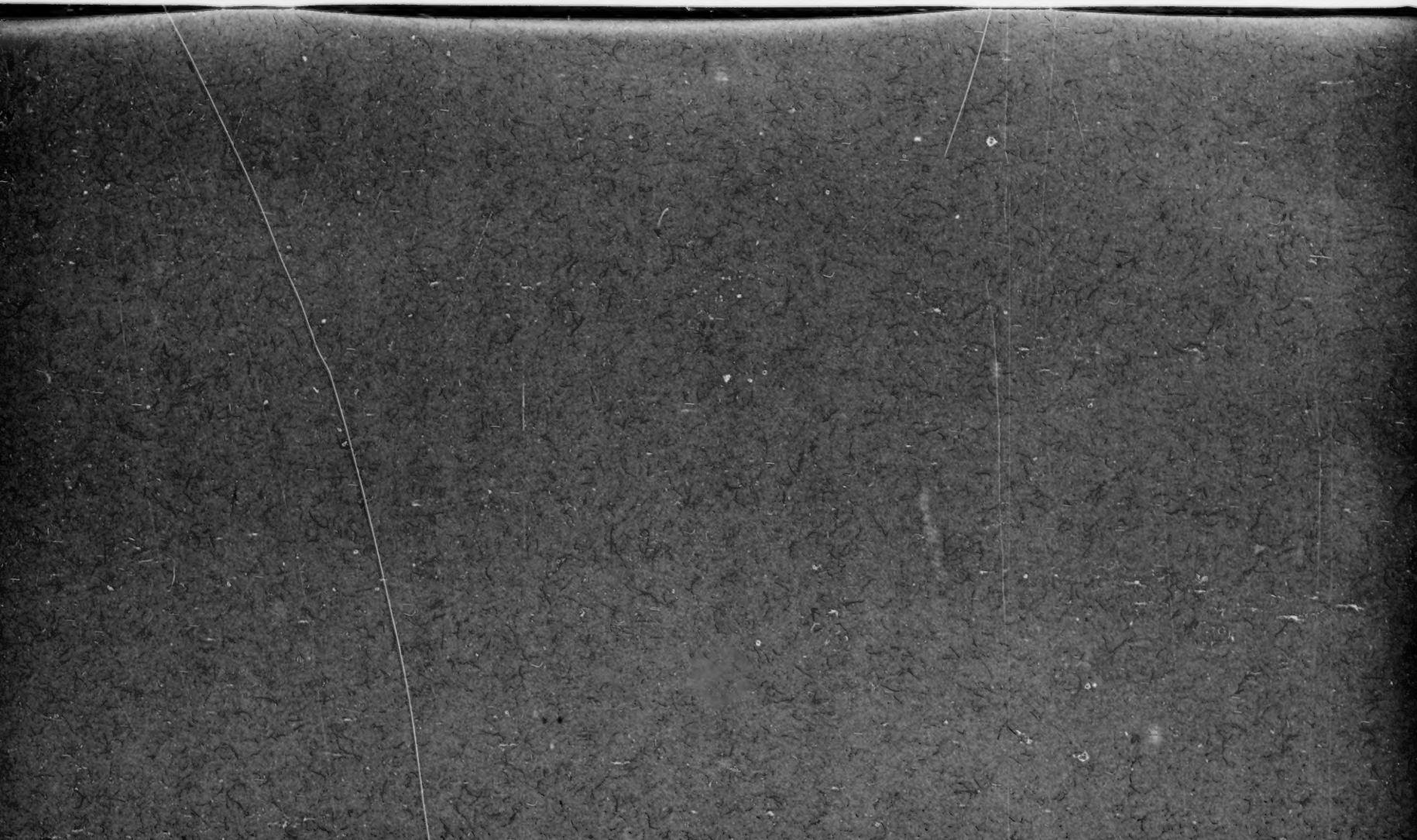

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission, as part of an investigation of a charge of discrimination, had authority to require an employer to compile information identifying its former employees by race.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 785 F.2d 471. The opinion of the district court (Pet. App. 14a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1986. The petition for a writ of certiorari was filed on April 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission (EEOC or Commission) brought this action to enforce an administrative subpoena seeking, inter alia, evidence from petitioner Maryland Cup Corporation regarding the race of its

employees in the 1976-1978 period. The United States District Court for the District of Maryland denied in relevant part the EEOC's request (Pet. App. 14a-21a); the court of appeals reversed (*id.* at 1a-13a).

1. In January 1979, the EEOC issued a charge pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6, alleging that petitioner had, at five of its facilities, engaged in a pattern of discrimination against its black and female employees with respect to recruitment, hiring, job assignments, training, promotions, and salaries (Pet. App. la-2a; C.A. App. 14-16). In furtherance of its investigation of the charge, the Commission issued a subpoena, part of which is now subject to challenge (Pet. App. 2a). As modified on administrative appeal, the subpoena seeks, inter alia, documents for the years 1976 through 1980 containing information about employees and applicants, including their race, sex, job classification, promotions, and salary (*ibid.*). Where documents showing the race of employees are unavailable, petitioner is required to reconstruct the information to the extent possible (C.A. App. 124).

Petitioner agreed to produce lists for 1979 through 1981 showing the race of employees but refused to compile race information for 1976 through 1978 (Pet. App. 3a), contending that it would be unduly burdensome to compile that information. Photo identification badges still exist for 40% of those employees; with respect to the remaining 60%, petitioner would have to interview its supervisors and coworkers to obtain the information (*ibid.*; C.A. App. 243-244).

2. The Commission brought this action to enforce the subpoena. The district court refused to enforce the demand for information identifying the race of former employees on the ground that "[i]t is not the obligation of one under

investigation to call witnesses in and do the preparation of work product in connection with the statistical data which underlie the case" (Pet. App. 17a-18a). The court suggested that the Commission obtain the information by issuing subpoenas requiring petitioner's personnel director and "various other persons" to testify as to the race of employees (*id.* at 18a; see also C.A. App. 295).[1]

3. The court of appeals reversed (Pet. App. la-13a). After recognizing that "the evidence sought is relevant and material to the investigation" (*id.* at 5a), the court held that "the EEOC has the authority to compel [petitioner] to produce evidence that does not presently exist in documentary form" (*id.* at l0a (citations omitted)). The court relied on Section 11(1) of the National Labor Relations Act, 29 U.S.C. 161(1) (incorporated into Title VII by 42 U.S.C. 2000e-9), which authorizes the EEOC to require " 'production of any evidence' "; the fact that the 1972 amendments to Title VII "expanded the EEOC's investigative power"; and case law upholding the Commission's authority to require compilation of information "that does not presently exist in documentary form" (Pet. App. 9a-l0a). The court of appeals concluded that petitioner "has not shown that the cost of gathering this information is unduly burdensome in the light of the company's normal operating costs. Nor has

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[1]Although petitioner provided some of the other evidence sought in the subpoena, it refused to reproduce the required documents unless the Commission agreed to reimburse the company for copying costs or to bring its own copying machine onto company premises (Pet. App. 3a). The district court held that the Commission must pay reproduction costs and cannot compel petitioner to produce documents at the Commission's office (*id.* at 16a-17a, 21a). The court of appeals reversed on the ground that petitioner failed to show that production of the documents at the Commission's office would pose an undue burden (*id.* at 7a-8a). Petitioner does not seek further review of this holding.

The EEOC did not appeal the district court's ruling that it was not entitled to a tour of petitioner's plant (Pet. App. 2a n.2, 17a, 21a).

the company shown that gathering the information would threaten its normal business operations" (*id.* at 11a (citation omitted)). Accordingly, the court enforced the subpoena except insofar as it required petitioner to interview former supervisors who are no longer in its employ and subject to its control (*id.* at 12a).[2]

ARGUMENT

The petition presents two questions: whether the EEOC has authority under Section 710 of Title VII, 42 U.S.C. 2000e-9, to subpoena the information at issue[3] and, if so, whether the subpoena should nonetheless have been invalidated under Fed. R. Civ. P. 33. But the subpoena in this case is valid under both Section 710 and Rule 33 and there is no decision of this Court or any other court of appeals to the contrary. Further review is not warranted.[4]

1. The court of appeals correctly held that the EEOC may compel petitioner to compile a list identifying its former employees by race. Petitioner does not challenge the court's holding that information showing the racial composition of petitioner's workforce is relevant to the pattern and

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[2]In a separate concurring opinion (Pet. App. 12a-13a), Judge Sneeden disagreed with "certain broad language in the majority's opinion," but concluded that "the facts of this case indicate that it was not unduly burdensome for the employer to create evidence by interviewing present and former employees" (*ibid.*).

[3]The first question presented (Pet. i) and the rest of the petition indicate that only the requirement that petitioner interview its employees—and not that it evaluate their badges—is now challenged.

[4]Neither question presented was squarely raised by petitioner in the court below. The gist of petitioner's brief in the court of appeals was not that compilations could not be subpoenaed, but only that making the compilation in this case would be unduly burdensome (Respondent's Br. 26-28). Petitioner did not mention Rule 33 in its brief to the court of appeals, and mentioned Rule 45 only cursorily (*id.* at 24). Although the court below did address the first issue, its discussion of the applicability of Rule 33 was limited to a "cf." citation. See page 11, *infra*.

practice charge under investigation.[5] Rather, petitioner contends that the only way the Commission may obtain this relevant information is by issuing a series of subpoenas compelling personnel officials, supervisors, and co-workers to testify as to the race of former employees. This position, if accepted, would be considerably more burdensome for both parties. The court of appeals sensibly rejected petitioner's arguments, and its decision is supported by the overwhelming weight of the case law, which has consistently upheld the Commission's authority to subpoena compilations of information, including identification of employees by race or sex.

The EEOC's broad authority to compel production of evidence derives from Section 710 of Title VII (42 U.S.C. 2000e-9), which incorporates by reference the statute authorizing the National Labor Relations Board's subpoena authority (§ 11(1), National Labor Relations Act, 29 U.S.C. 161(1)). Thus, EEOC has authority "to issue * * * subp[o]enas requiring the attendance and testimony of witnesses or the production of *any evidence*" (*ibid.* (emphasis added)).[6]

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[5]As the court of appeals held (Pet. App. 6a), evidence for the three years immediately preceding the 1979 charge is relevant to the issue of whether petitioner engaged in a pattern or practice of discrimination (see also *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 68-69 (1984); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 309-310 n.15 (1977)) and to determination of back pay liability, which could extend back two years before the filing of the charge (§ 706(g), 42 U.S.C. 2000e-5(g)).

[6]Contrary to petitioner's contention (Pet. 10 n.9), NLRB regulations do not indicate that its subpoenas must be limited to production of existing documents and attendance of witnesss. The *NLRB Casehandling Manual* (CCH) ¶ 17,760 (Oct. 1984) (emphasis in original), to which petitioner cites, provides:

> In all but the exceptional case, it is advisable to provide, *in the body of the subpoena*, for alternatives in lieu of physical production; e.g., that the party against whom the subpoena runs may furnish a signed statement setting forth the desired information, provided that pertinent records are made available to Board

The history of Congress's grants of subpoena authority to the EEOC clearly indicates that the Commission's current authority goes beyond the ability to issue the administrative equivalent of subpoenas *ad testificandum* and *duces tecum*. Prior to 1972, the Commission had authority only "to examine witnesses under oath and to require the production of documentary evidence." Pub. L. No. 88-352, § 710(a), 78 Stat. 264 (42 U.S.C. (1970 ed.) 2000e-9(a)).[7] This authority was further limited by a provision of the statute permitting district courts to modify or set aside the Commission's demand if it failed "to comply * * * with the limitations generally applicable to compulsory process" (42 U.S.C. (1970 ed.) 2000e-9(c)). The EEOC's current subpoena authority was included in the 1972 amendments to Title VII, as part of a major overhaul of the statute to increase the Commission's enforcement powers. Pub. L. No. 92-261, § 7, 86 Stat. 109 (codified at 42 U.S.C. 2000e-9); see generally *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 62-63 (1984); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359, 361-366 (1977). The expansive language allowing the agency to require "production of any evidence" and the elimination of the "limitations generally applicable to compulsory process" compel the conclusion that the Commission was no longer limited to examining witnesses and compelling production of existing documents. As the court of appeals

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agents for the purpose of checking the accuracy of the statement. See, *e.g.*, *Storkline Corp.* v. *NLRB*, 298 F.2d 276, 277 (5th Cir. 1962). The other NLRB source cited by petitioner, 29 C.F.R. 102.31, authorizes subpoenas "requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control."

[7]Petitioner's implication that the purpose of the 1972 amendment to Section 710 was to provide only for testimonial evidence (Pet. 9 n.7) is thus belied by the fact that the Commission had the power to obtain such evidence prior to the amendment.

recognized (Pet. App. 10a), the amendment was intended to free the Commission from unnecessary confinement and to broaden its authority to compel the production of " 'any evidence.' "

In contrast, petitioner seeks to impose new constraints that would require the Commission to take formal testimony under oath if evidence does not exist in documentary form. This would be a cumbersome and time-consuming process. Furthermore, petitioner cannot, of course, explain why the EEOC's request in this case is not a request for the production of evidence. That the evidence is not already compiled or written down does not mean it is nonexistent. And, of course, neither can petitioner explain why the evidence sought here, which is the most fundamental sort of statistic imaginable for an anti-discrimination action, is beyond the statute's contemplation. Cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973).

The courts of appeals have uniformly agreed with the court below that the Commission has authority to require an employer to compile information, including identification of employees by race.[8] The numerous cases enforcing

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[8]See, *e.g.*, *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981) (citations omitted) ("[t]his hoary point [that the EEOC has no authority to require compilation of information] has already been correctly rejected in other EEOC cases" (citations omitted)); *New Orleans Pub. Serv., Inc.* v. *Brown*, 507 F.2d 160, 164-165 (5th Cir. 1975); *Circle K Corp.* v. *EEOC*, 501 F.2d 1052, 1054-1055 (10th Cir. 1974); *Motorola, Inc.* v. *McLain*, 484 F.2d 1339, 1346 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974); *Sheet Metal Workers Int'l Ass'n Local 104* v. *EEOC*, 439 F.2d 237, 243 (9th Cir. 1971); *Graniteville Co. (Sibley Div.)* v. *EEOC*, 438 F.2d 32, 41-42 (4th Cir. 1971). See also *Valley Indus. Servs.* v. *EEOC*, 570 F. Supp. 902, 907 (N.D. Cal. 1983); *EEOC* v. *State Farm Mut. Auto. Ins. Co.*, 34 Fair Empl. Prac. Cas. (BNA) 1073, 1074-1075 (N.D. Cal. 1982); *Shell Oil Co.* v. *EEOC*, 523 F. Supp. 79, 89 (E.D. Mo. 1981), aff'd in relevant part, 676 F.2d 322, 326 (8th Cir. 1982), rev'd on other grounds, 466 U.S. 54 (1984); *EEOC* v. *University of Pittsburgh*, 487 F.Supp. 1071, 1077 (W.D. Pa. 1980),

subpoenas requesting identification of employees contain no indication that the information already existed in documentary form, and the very nature of a "compilation" request, of course, presumes that a new document is being created.[9] There is, furthermore, no valid reason for denying the Commission information essential to its investigation simply because the race of employees is recorded in the memories of supervisors and co-workers rather than in personnel files. Cf. *United States* v. *Euge*, 444 U.S. 707, 713 n.7 (1980) (citation omitted) ("Wigmore has identified the testimonial duty as including an obligation 'to disclose for the purpose of justice all that is in his control which can serve the ascertainment of the truth, [and] this duty includes * * * mental impressions preserved in his brain * * *.' ")[10]

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aff'd, 643 F.2d 983 (3d Cir.), cert. denied, 454 U.S. 880 (1981); *EEOC* v. *United States Fidelity & Guar. Co.*, 414 F. Supp. 227, 242-244 (D. Md.), aff'd, 538 F.2d 324 (4th Cir. 1976) (Table).

The four decisions—all at the district court level—cited by petitioner (Pet. 10-11) for the proposition that the EEOC lacks authority to compel compilations each involved demands for evidence issued before EEOC obtained subpoena authority in 1972. Even so, in one of the cases—*H. Kessler & Co.* v. *EEOC*, 53 F.R.D. 330 (N.D. Ga. 1971), aff'd, 468 F.2d 25 (1972), modified on other grounds, 472 F.2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973)—the court ordered the "new" compilation of a list of employees. The quotations (Pet. 11) from *EEOC* v. *Bay Shipbuilding Corp., supra*, and *EEOC* v. *Bethlehem Steel Corp.*, 765 F.2d 427 (4th Cir. 1985), are out of context; the full context supports the EEOC here.

[9]This construction of the EEOC's authority also accords with decisions construing the scope of the NLRB's power to issue subpoenas under 29 U.S.C. 161(1). This Court in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 768-769 (1969), construed the term "any evidence" to give the NLRB the power to subpoena a compiled list of names and addresses of employers eligible to vote in an election, though the Court did not explicitly address the compilation aspect of the subpoena.

[10]Petitioner states that Commission regulations discouraged employers from maintaining records showing the race of employees (Pet. 4 n.5). Current EEOC regulations, however, and the regulations in effect

As this Court has recognized, "it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired" (*EEOC* v. *Shell Oil Co.*, 466 U.S. at 69). The court of appeals correctly refused to impose constraints on the Commission's subpoena authority which would significantly hamper the Commission's ability to obtain the basic evidence necessary to determining whether petitioner has engaged in a pattern or practice of discrimination.

2. Petitioner's other contention is that the subpoena in this case should have been invalidated by application of the Federal Rules of Civil Procedure. This contention is without merit. The court of appeals expressly held, and Judge Sneeden emphasized in his concurrence, that the compilation required by the subpoena was not unduly burdensome (Pet. App. 8a, 11a, 13a); thus, it was within the bounds of Fed. R. Civ. P. 26(b)(1), 26(c), and 45(b) (see Pet. 12-14).[11] The court of appeals' conclusion with respect to this factual issue is not appropriate for review by this Court and, in any event, is correct. Moreover, the information sought by the Commission subpoena is actually more easily compiled by petitioner than by the EEOC, and thus Fed. R. Civ. P. 33(c) is inapplicable as well (see Pet. 13-15). If petitioner could not be asked to compile the information, the Commission would have to issue an administrative subpoena to each supervisor and co-worker to testify about the race of former

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during the time in question, merely recommend that permanent race identification data be kept separately from the employee's basic personnel file or other records (see 29 C.F.R. 1602.13).

[11]Corporations are of course required to compile lists routinely under the Federal Rules (see, *e.g.*, *Burns* v. *Thiokol Chem. Corp.*, 483 F.2d 300, 307 (5th Cir. 1973)); knowledge by a corporation's officers and employees is imputed to the corporation itself (see, *e.g.*, *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974)).

employees. There could be substantial delays during the administrative appeal of the subpoenas. Because petitioner has refused to allow EEOC access to its facilities or its employees, the Commission does not have the knowledge of company operations or the freedom of movement within a facility that company officials would have. The Commission would probably have to recall many employees with more delays. It clearly would be much easier, and much less intrusive, for petitioner to compile this information.

Of course, the Federal Rules of Civil Procedure do not by their terms apply to administrative proceedings (Fed. R. Civ. P. 1) and the statute that gives the EEOC subpoena authority does not incorporate the Federal Rules.[12] Moreover, the advisory committee note to Rule 45 expressly disclaims that rule's application to administrative subpoenas, which, depending on the authorizing statute, can be broader or narrower than conventional subpoenas.[13] Nonetheless, we agree that the proper scope of administrative subpoenas should not be considered in a vacuum, ignoring

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[12]As discussed at pages 6-7, *supra*, the 1972 amendments deleted an explicit incorporation of "limitations generally applicable to compulsory process."

[13]The advisory committee note to Rule 45, governing subpoenas, begins by stating:

> This rule applies to subpoenas *ad testificandum* and *duces tecum* issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States.

See also, *e.g.*, *FTC* v. *Turner*, 609 F.2d 743, 745 n.3 (5th Cir. 1980); *Porter* v. *Mueller*, 156 F.2d 278, 279-280 (3d Cir. 1946); *Bowles* v. *Bay of New York Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945).

the law and practice in other pre-trial discovery contexts. In the area of administrative subpoenas the courts of appeals routinely have, for instance, applied an "undue burden" limitation similar to—but less stringent than—that articulated in Fed. R. Civ. P. 26(b)(1), 26(c), and 45(b) with respect to civil discovery generally (Pet. App. 4a). Reference to other areas of practice is necessary to ensure that subpoena statutes are read neither too broadly nor too narrowly. Cf. *United States* v. *Euge*, 444 U.S. at 712-714; *EEOC* v. *Packard Elec. Div., General Motors Corp.*, 569 F.2d 315, 317, 319 (5th Cir. 1978); *United States* v. *Friedman*, 532 F.2d 928, 937 (3d Cir. 1976).[14] And because the EEOC's authority to issue administrative subpoenas allows it to make requests that bear some resemblance to interrogatories, the practicalities of Rule 33(c) are not irrelevant, as the court of appeals indicated by its "cf." citation to Rule 33 in support of its interpretation of 29 U.S.C. 161(1) (Pet. App. 11a). Nevertheless, although the Federal Rules do operate indirectly and by analogy in this way to guide the courts in reviewing administrative subpoenas, the fact remains that, in any event, the EEOC's subpoena in this case is entirely consistent with them. Thus, the scope of the Federal Rules analogy is not an appropriate issue for this Court's consideration.

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[14]Similarly, in the cases cited by petitioner (Pet. 12-13), the courts of appeals looked to Rule 45, but only as a convenient analogy to aid them in determining the standards applicable to enforcement of administrative subpoenas. See *EEOC* v. *Packard Elec. Div., General Motors Corp., supra*; *New Orleans Pub. Serv., Inc.* v. *Brown, supra*; *United States* v. *Friedman, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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